

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

The Southern New England Telephone Company

FILE No. _____

Petition for Declaratory Ruling and Order Preempting the Connecticut Department of Public Utility Control's Decision Directing The Southern New England Telephone Company To Unbundle Its Hybrid Fiber Coaxial Facilities.

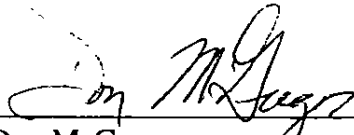
Declaration of Don McGregor

1. My name is Don McGregor, and I am over the age of 18.
2. I am currently the Chief Financial Officer of The Southern New England Telephone Company ("SBC Connecticut"). My business address is 310 Orange Street, New Haven, Connecticut.
3. I am familiar with SBC Connecticut's decommissioned hybrid fiber-coaxial ("HFC") facilities, and with the costs that would be required to deploy new plant and the other equipment necessary to reactivate that network, as well as the costs to operate and maintain those facilities.
4. I have analyzed and estimated the specific reactivation costs and upgrade expenses that SBC Connecticut would be forced to incur if it were required to make the HFC network available to Gemini and other carriers on an unbundled basis. Those costs include each of the following:
 - a. Reactivating power supply and re-deploying batteries – more than \$0.5 million;
 - b. Deploying and activating nodes and amplifiers – more than \$4.0 million;
 - c. Replacing previously removed coaxial plant – more than \$3.0 million;

- d. Non-recurring start-up costs, including the cost of training a dual workforce – more than \$1.5 million; and
- e. Reserve for unforeseen contingencies (15 percent of plant and equipment costs) – more than \$1.0 million.

Total Estimate: More than \$10.0 million

5. I have additionally analyzed and estimated the ongoing costs that SBC Connecticut would annually incur to operate the HFC facilities that SBC Connecticut has been directed to unbundle. These costs, which include (but are not limited to) power supplies and workforce related expenses, total in excess of \$4.7 million per year.



Don McGregor
Chief Financial Officer

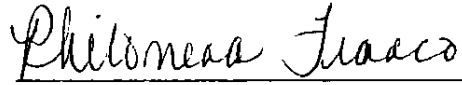
STATE OF CONNECTICUT)

) ss: New Haven

February 9, 2004

COUNTY OF NEW HAVEN)

Subscribed to and sworn before:



Notary Public

PHILOMENA FRANCO
NOTARY PUBLIC
MY COMMISSION EXPIRES FEB. 2009

1 THIS TRANSCRIPT CONTAINS 133 PAGES
2 NUMBERED 1 THROUGH 133
3

4 DRAFT
5 FOR REVIEW AND CORRECTION PURPOSES ONLY
6

7 STATE OF CONNECTICUT
8 DEPARTMENT OF PUBLIC UTILITY CONTROL
9

10 Docket No. 03-01-02
11 Petition of Gemini Networks Connecticut,
12 Incorporated for Declaratory Ruling Regarding
13 Southern New England Telephone Company's
14 Unbundled Network Elements
15

16 Oral Arguments held at the Department of
17 Public Utility Control, 10 Franklin Square,
18 New Britain, Connecticut, on December 10,
19 2003, beginning at 11:05 o'clock a.m.
20

21 H e l d B e f o r e:

22 The Hon. JACK R. GOLDBERG, Chairperson

23 The Hon. DONALD DOWNES, Commissioner
24

25 Draft Copy

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1 A p p e a r a n c e s:

2 For Southern New England Telephone

3 Company:

4 SBC SOUTHERN NEW ENGLAND TELEPHONE

5 COMPANY

6 310 Orange Street

7 New Haven, Connecticut 06510

8 By: GEORGE MOREIRA, ESQ.

9 PEGGY GARBER, ESQ.

10

11 Also present for SBC/SNET:

12 JOHN ANDRASIK

13

14 For Gemini Network, Inc:

15 MURTHA, CULLINA, LLP.

16 CityPlace I

17 185 Asylum Street

18 Hartford, Connecticut 06103-3469

19 By: JENNIFER D. JANELLE, ESQ.

20 DWIGHT JOHNSON, ESQ.

21

22 For the Office of Consumer Counsel:

23 WILLIAM VALLEE, ESQ.

24

25

Page 3

1 A p p e a r a n c e s (Cont'd.):

2 For the Office of the Attorney General:

3 JOHN WRIGHT, ESQ.

4 Assistant Attorney General

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1 THE CHAIRPERSON: Good

2 morning. We're here this morning for oral

3 arguments on Docket 03-01-02, Petition of

4 Gemini Networks Connecticut, Incorporated,

5 for Declaratory Ruling Regarding Southern New

6 England Telephone Company's Unbundled Network

7 Elements.

8 I'm Commissioner Jack

9 Goldberg, Chairman of this panel. With me is

10 the Chairman of the agency, Donald Downes.

11 Commissioner Jack Betkoski, the third member

12 of this panel cannot be here today and will

13 review the transcript once it is available.

14 Can I have appearances?

15 MR. MOREIRA: George Moreira

16 and Peggy Garber for the Southern New England

17 Telephone Company, Commissioners.

18 MS. JANELLE: I'm Jennifer

19 Janelle, this is Dwight Johnson, from Murtha

20 Cullina on behalf of Gemini Networks

21 Connecticut. We also have Rich Rollinson

22 from Gemini Networks with us.

23 THE CHAIRPERSON: Thank you.

24 MR. VALLEE: William Vallee

25 for the Office of Consumer Counsel.

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1 MR. WRIGHT: Good morning,

2 Commissioners. John Wright on behalf of the

3 Attorney General.

4 THE CHAIRPERSON: Further

5 appearances? Seeing none, Attorney Moreira.

6 MR. MOREIRA: Thank you,

7 Commissioner.

8

9 THE CHAIRPERSON: Let it rip.

10 MR. MOREIRA: Good morning,

11 Commissioners, and thank you for giving us

12 this opportunity to address the Department's

13 decision in this docket where the Department

14 has agreed with Gemini and ordered the

15 unbundling of the telco's remaining coaxial

16 facilities which, as you can tell from our

17 written exceptions, we are disappointed with,

18 and we really do believe that the draft

19 decision does not comport with state or

20 federal law, and I will address those points

21 in turn through my oral argument, but at

22 first I'd like to do a little brief

23 background just to give you context of what

24 we're talking about, what the facilities are

25 and how they relate to this very critical

Page 6

1 docket.

2 As you guys all know, I like

3 to draw. Here we go, State of Connecticut,

4 start simple. In blue will generally be our

5 copper-based network, what is unbundled

6 throughout the State of Connecticut, which is

7 made up of numerous central offices

8 throughout the state, interconnected through

9 with fiber and copper, and I'm not going to

10 put all hundred or so central offices that

11 are out there, but that's what it generally

12 would look like.

13 Off of the central office,

14 which is really what we're kind of talking

15 about in this docket, is a loop or a

16 quasi-loop. In our network, which is

17 currently unbundled -- I'll make the central

18 office bigger -- there's a main distribution

19 frame inside that office. From there, there

20 are copper pairs that will run out to various

21 people's homes, and you have, in our network,

22 a dedicated copper pair that goes to your

23 house. So you have a copper pair, I have a

24 copper pair. We each have our own individual

25 copper pair.

Page 7

1 This network is unbundled

2 according to state and federal law. It's

3 priced at TSLRIC, so if any given company

4 comes and they want to purchase, maybe

5 transport between two central offices, you

6 can get that at UNE prices. If you win a

7 customer and you want to get a loop to

8 someone's home, maybe Mrs. Smith up here in

9 Litchfield, you want that loop, you can get

10 that at unbundled pricing and that goes along

11 with switching and whatever other components

12 of our network that are required to be

13 unbundled. That's our network. That's also a

14 circuit-switched dedicated network.

15 Now, the facilities

16 we're talking about here today were

17 facilities that were used by SPV, our cable

18 company that is now defunct, that are out on

19 poles throughout the state of Connecticut at

20 different points on this -- throughout the

21 state.

22 They do not go to the main

23 distribution frame. They are not connected

24 to our network. They are not part of our

25 network. It's basically from pole to pole or

Page 8

1 underground conduit, as it may be, depending

2 on the given area of the state, that you'll

3 have roughly 3100 miles of co-ax. Those are

4 the facilities that Gemini would like

5 unbundled in this case and that you have

6 tentatively ordered be unbundled.

7 These facilities differ from

8 our copper-based network. Think of it as an

9 Apple computer and an IBM computer, different

10 platform altogether.

11 This platform is a shared

12 network. What do I mean by "shared"? You

13 don't have a dedicated copper twisted pair

14 that goes to your house, Commissioner, and

15 then I have a separate one that goes to my

16 house. Think of a big tube of which we all

17 connect into, and that is a shared platform.

18 Ours, on the other hand, has

19 a dedicated twisted pair that goes from point

20 to point.

21 In addition, this red that's

22 throughout the state, that was paid for

23 solely by the shareholders of SNET/SBC. In

24 Docket 00-08-14 the Department let us close

25 down SPV. We took all the SPV assets off our

Page 9

1 books, took the loss to the shareholders.

2 And we've complied with that disposition work

3 because we have sold the video pieces that we

4 could sell. There still are some amplifiers

5 and optical nodes out on this network.

6 Currently -- and I just

7 misspoke -- it's not even a network. It's

8 pieces of a network. Because you'll have a

9 piece here, you'll have a piece here. Even

10 if it's mostly connected, there's no lights

11 on. When you think of your fiber optic now,

12 you turn the light on and you follow it

13 throughout the whole state. You think, Oh,

14 boy, we've got a network. If you went to a

15 NOC and you looked at it, it's not even a

16 network. We just have our pieces of co-ax up

17 on poles, generally speaking. That's the

18 stuff we're talking about here that is being

19 requested to be unbundled.

20 I kind of wanted to lay that

21 framework to show the differences between

22 what we're talking about here. I will be

23 referring to that throughout the hearing.

24 COMM. DOWNES: Counselor --

25 MR. MOREIRA: Sure.

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1 COMM. DOWNES: -- let's
 2 return to the part about the shareholders for
 3 just a minute here, and I defer, of course,
 4 to my expert colleague, but I was under the
 5 impression that the SPV system originally was
 6 built by SNET with contributions from
 7 ratepayers. No?

8 MR. MOREIRA: No. The intent
 9 of HFC, as we know it, that network, was at
 10 some point to replace the copper network, and
 11 we would have been all HFC throughout the
 12 whole state of Connecticut.

13 COMM. DOWNES: I'm with you.

14 MR. MOREIRA: And so at that
 15 point -- and this all really started really
 16 post rate of return, we became all reg as
 17 this was all proceeding --

18 COMM. DOWNES: Yes.

19 MR. MOREIRA -- so there is no
 20 really ratepayer place to get the money from.
 21 So as this starts being built in the mid 90s,
 22 just as we're getting into all reg, and we've
 23 been in all reg now probably eight years or
 24 so, since the mid '90s, so there really is no
 25 ratepayer place to go from, and then at the

Page 11

1 end of the day it didn't matter because the
 2 loss was supposed to be borne by the
 3 shareholders. And that is more of an aside.
 4 It's not a central piece to the argument.
 5 But there were arguments raised that, hey,
 6 the ratepayers paid for this and therefore it
 7 is a community good that should be out there.

8 COMM. DOWNES: Yes.

9 MR. MOREIRA: So that's more
 10 of an aside to the overall argument --

11 COMM. DOWNES: I understand.

12 MR. MOREIRA: -- as opposed
 13 to some of the arguments that we raise in the
 14 written exceptions.

15 COMM. DOWNES: I appreciate
 16 that.

17 MR. MOREIRA: Because it
 18 wasn't really addressed in the draft
 19 decision, but it is a critical element.

20 COMM. DOWNES: Let me pursue
 21 a little different piece. You were
 22 explaining that what's left now isn't really
 23 a network, it's pieces of a network. It's
 24 some disconnected segments of various kinds.

25 MR. MOREIRA: Generally

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1 speaking, yes.

2 COMM. DOWNES: Has -- has
 3 SBC -- I understand you've written off the
 4 loss, and so forth. Has SBC contemplated any
 5 other use for this? I mean, was this
 6 literally a matter of just leaving it on the
 7 poles and, in effect, abandoning it, if you
 8 will?

9 MR. MOREIRA: In essence, it
 10 is abandoned in the sense that it's not going
 11 to be used. We don't have any future plans
 12 for it, but the only plan that we've had for
 13 it is to sell it. So if anybody wants it,
 14 they can buy it from us at a fair market
 15 value price as negotiated. Because that's
 16 how the Gemini whole thing started.

17 COMM. DOWNES: I see.

18 MR. MOREIRA: We actually
 19 were negotiating at one point. We made a,
 20 hey, you want to buy it for "X" dollars?
 21 They never responded and then came to you for
 22 unbundling.

23 COMM. DOWNES: Okay.

24 MR. MOREIRA: So if there's
 25 an investor out there that would like to buy

Page 13

1 the co-ax plant that's out there, give us a
 2 call.

3 COMM. DOWNES: Okay. And
 4 last question, and then I promise I'll let
 5 you finish your presentation.

6 As I understand -- as I
 7 understand the proposal that's in front of us
 8 at the moment here, Gemini would, in effect,
 9 be -- be either buying or leasing this
 10 property. I mean, they're making -- their
 11 proposal would be to make a payment to SBC
 12 and -- as I understood it. Why don't we try
 13 it the other way.

14 Please explain to me what we
 15 think, at least your understanding of the
 16 deal, would be. How about that?

17 MR. MOREIRA: My
 18 understanding of the deal currently, based on
 19 the draft decision, is that the Department
 20 said, SNET, you're wrong, this is subject to
 21 unbundling rules. We have the jurisdictional
 22 authority to unbundle it.

23 COMM. DOWNES: Right.

24 MR. MOREIRA: Gemini meets
 25 the impairment standard; therefore, they're

| | |
|---|---|
| <p style="text-align: right;">Page 14</p> <p>1 entitled to unbundled access, which means</p> <p>2 they're entitled to access to those</p> <p>3 facilities at TSLRIC pricing, which would be</p> <p>4 leasing it at UNE pricing, TSLRIC, which is a</p> <p>5 cost-plus type pricing. Go ahead, comply</p> <p>6 with this order, put some cost studies</p> <p>7 together, and as they lease a piece, you will</p> <p>8 charge them, I don't know --</p> <p>9 COMM. DOWNES: Yes.</p> <p>10 MR. MOREIRA: I don't know</p> <p>11 how to do it, but let's assume we did, you</p> <p>12 know, ten dollars, you know, per whatever.</p> <p>13 COMM. DOWNES: I understand.</p> <p>14 Okay.</p> <p>15 Now, your point a little bit</p> <p>16 earlier also was that this is a shared</p> <p>17 network as opposed to the -- well, I'm not</p> <p>18 sure what the alternative form was.</p> <p>19 MR. MOREIRA: Dedicated</p> <p>20 circuit switch network.</p> <p>21 COMM. DOWNES: Thank you.</p> <p>22 Now, is one of the</p> <p>23 implications of that that another company or</p> <p>24 companies like Gemini could come along and</p> <p>25 say, Well, gee, that sounds like an</p> | <p style="text-align: right;">Page 16</p> <p>1 piece, and then AT&T to order a different</p> <p>2 piece, because it's a different platform.</p> <p>3 It's, like I said, an Apple versus an IBM.</p> <p>4 For us, when we say two million lines, there</p> <p>5 literally are two million little lines out</p> <p>6 there that go to everybody's home, and at</p> <p>7 some point may get aggregated certainly on</p> <p>8 the transport side, but on the loop side you</p> <p>9 literally have two million little lines.</p> <p>10 There you have, instead of</p> <p>11 having your own personal driveway, you have</p> <p>12 an on ramp that puts you on a bigger highway,</p> <p>13 and we don't know how, which is part of our</p> <p>14 argument that will be coming up, we've kind</p> <p>15 of jumped ahead, but generally speaking we</p> <p>16 don't know how to break that up to say, okay,</p> <p>17 this company gets this piece, this company</p> <p>18 gets that piece, this company gets that</p> <p>19 piece.</p> <p>20 Gemini, I think, would argue,</p> <p>21 Hey, you missed the boat, Moreira. We want</p> <p>22 to unbundle the whole thing because we'll</p> <p>23 just rent the whole thing from you.</p> <p>24 Presuming that's even an element, which I</p> <p>25 would disagree, but that's --</p> |
| <p style="text-align: right;">Page 15</p> <p>1 interesting idea, we'd like to also use that</p> <p>2 ourselves, and then they would also be</p> <p>3 obligated to make payments to you by way of</p> <p>4 access charges, lease, however you</p> <p>5 characterize it. Is that a fair rendition?</p> <p>6 MR. MOREIRA: That is a fair</p> <p>7 rendition as to what other companies could</p> <p>8 do. Once you make it a UNE, I have to make</p> <p>9 it available on a nondiscriminatory basis to</p> <p>10 anybody who wants it. Similar to my network</p> <p>11 that we already have existing here -- and I'm</p> <p>12 calling it mine, it's not really mine -- this</p> <p>13 network, anyone can come and order, any CLEC</p> <p>14 can order a given component of it if they've</p> <p>15 won that given customer. They can order a</p> <p>16 piece of it.</p> <p>17 COMM. DOWNES: I get it.</p> <p>18 MR. MOREIRA: The problem with</p> <p>19 this one, no one knows how to unbundle it,</p> <p>20 presuming it is subject to unbundling. No</p> <p>21 one has come up with an OSS system as far as</p> <p>22 we know which allows, you know, Commissioner</p> <p>23 Downes' corporation to order this piece of</p> <p>24 the network and then Gemini to order that</p> <p>25 piece, and then Cox to order a different</p> | <p style="text-align: right;">Page 17</p> <p>1 COMM. DOWNES: I understand.</p> <p>2 MR. MOREIRA: I think that's</p> <p>3 their argument.</p> <p>4 COMM. DOWNES: I'm just</p> <p>5 trying to explore the hypothetical here. And</p> <p>6 final point, and if I understood -- if I</p> <p>7 misunderstood you, I apologize, but I think</p> <p>8 what you were trying to say to me was that</p> <p>9 for anybody to use this, this set of</p> <p>10 facilities, whether it's Gemini or anybody</p> <p>11 else, they will have to have some sort of an</p> <p>12 interface that allows them to connect this to</p> <p>13 the rest of the system, if you will. Right?</p> <p>14 MR. MOREIRA: Absolutely, for</p> <p>15 their system, because Gemini doesn't want to</p> <p>16 use any of the blue. They only want the red</p> <p>17 and then connect it to their facilities.</p> <p>18 COMM. DOWNES: I see.</p> <p>19 MR. MOREIRA: Whoever uses it</p> <p>20 for whatever purpose, whether you want to use</p> <p>21 it for telecommunications, for cable modem</p> <p>22 service, which is the kind of company that</p> <p>23 Gemini is, for whatever type, voiceover IP,</p> <p>24 you're going to have to put whatever network</p> <p>25 equipment necessary to make that happen and</p> |

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1 then connect it. That's not to say --

2 COMM. DOWNES: And that's

3 what you meant by the OSS?

4 MR. MOREIRA: No, no. That's

5 separate from the OSS. The OSS is an

6 operator support services --

7 COMM. DOWNES: The financial

8 and the billing piece of it?

9 MR. MOREIRA: It's the

10 billing and the service piece of it where

11 everyone would go to order it.

12 COMM. DOWNES: I get it.

13 MR. MOREIRA: That's what the

14 OSS is. This is the equipment that makes it

15 work. Like anything, I could have a copper

16 spool sitting right here. It's capable for

17 telecommunications but until I hook it up to

18 something, until I have the electronics --

19 COMM. DOWNES: Right. So

20 they really need two things. They need the

21 physical interface, and they also need the

22 OSS, the financial and operations.

23 MR. MOREIRA: That's

24 correct. And to be fair to Gemini, they said

25 we'll provide all that stuff to make it work,

Page 19

1 and if there's a piece that isn't connected,

2 we'll connect it.

3 COMM. DOWNES: I get it.

4 MR. MOREIRA: That's what

5 they were saying.

6 COMM. DOWNES: Thank you,

7 sir. I appreciate it. Sorry to knock you

8 off course.

9 MR. MOREIRA: No problem. So

10 with that context, our first main argument as

11 to why the draft decision is in error as a

12 matter of law is that the Department has

13 found in this draft decision that these

14 coaxial facilities constitute a network

15 element, which is the first step in any

16 unbundling analysis.

17 On page 36 of the draft

18 decision, which I would like to bring

19 copies -- may I approach, Commissioners?

20 COMM. DOWNES: Sure.

21 MR. MOREIRA: I've attached

22 pages 35 and 36. If you go on the second

23 page, the bottom of page 36, I have it

24 highlighted.

25 After discussing the

Page 20

1 capability test that the FCC has, the

2 Department at the bottom of page 36 makes

3 this very critical finding. It says: "The

4 Department also finds that based on

5 47-USC-153, subsection 29, the HFC meets the

6 definition of network element and therefore

7 must be unbundled."

8 We posit that that is an

9 incorrect application of law because if you

10 take a look at 47-153-29, of which may I

11 approach, I have copies for everybody --

12 COMM. DOWNES: Yes.

13 MR. MOREIRA: -- which I've

14 highlighted --

15 COMM. DOWNES: Thank you,

16 sir.

17 MR. MOREIRA: -- you also

18 have to look at.

19 COMM. DOWNES: Now that's

20 large enough so that I can read it.

21 MR. MOREIRA: I made it as

22 big as possible.

23 If you take a look at 29, it

24 says: "The term 'network element' means a

25 facility or equipment used in the permission

Page 21

1 of telecommunications service." Well, then

2 what is a telecommunication service? You

3 have to look at 46, which is on your next

4 page, which is basically defined the offering

5 of telecommunications for a fee directly to

6 the public or indirectly to the public,

7 basically is what it says.

8 COMM. DOWNES: Uh-huh.

9 MR. MOREIRA: If you put

10 those two together, basically to be a network

11 element this piece of equipment has to be

12 used to provide telecommunications for a fee

13 to the public.

14 Just on the statutory

15 threshold, this equipment does not meet that

16 definition in any way whatsoever. Those

17 little red pieces out there were only used

18 for -- when they even were working -- were

19 only used for CATV services. They were never

20 used, never equipped to provide

21 telecommunications, never.

22 Let's just say you say, Well,

23 George, I still think it meets that statutory

24 framework. The FCC for sure has spoken on

25 this; they've interpreted this meaning of

| | |
|--|--|
| <p style="text-align: right;">Page 22</p> <p>1 network element. And they have. If you look 2 in the TRO order, which is the triennial 3 review order -- again, may I approach? 4 COMM. DOWNES: Yes. 5 MR. MOREIRA: -- paragraphs 6 56 through 60 of the triennial review 7 order -- I only give you 56 because it hits 8 the point very succinctly -- they conclude in 9 defining or interpreting 153-29 that a 10 network element refers -- and there's two 11 pieces to it -- an element of the incumbent 12 LEC's network that is capable of being used 13 to provide a telecommunications service. 14 Thus, under the FCC test, there's two pieces. 15 Just as a threshold matter to even define it 16 as a network element, it's got to be part of 17 the telecommunication -- my network, the 18 incumbent's network, number one; and then 19 number two, it has to meet the FCC's 20 capability test which is further defined. It 21 has to be capable of providing 22 telecommunications services. 23 If, as you take a look, as 24 I've proffered earlier, it is not part of my 25 network; it cannot be unbundled. Currently</p> | <p style="text-align: right;">Page 24</p> <p>1 telecommunications, it's connected to your 2 network and it's easily called into service, 3 if it meets those standards, then it is 4 subject to unbundling. 5 Is it connected to your 6 network and easily called into service? And 7 that is right in your own draft decision on 8 page 36, of which you have a copy. Up at the 9 top you have two paragraphs of which you use 10 the UNE remand order from the FCC's UNE 11 remand order. 12 In that paragraph, the second 13 paragraph, they talk about the copper spool 14 and how, if you said, well, just simply using 15 capability, that would be much too broad. 16 They say a copper spool in and of itself is 17 capable, but if you define that as UNE, that 18 is too broad. But then they say, well, dark 19 fiber is different, and here's what we mean 20 by capability, it is physically connected to 21 the incumbent's network and easily called 22 into service. 23 Our facilities, our co-ax 24 facilities, do not meet that standard, do not 25 meet that rationale. It is not easily called</p> |
| <p style="text-align: right;">Page 23</p> <p>1 there is no evidence before this Department 2 that indicates in any way that the coaxial 3 facilities that are on those poles are 4 connected to my network. That goes as to the 5 first piece. It's not part of my network in 6 any way. I don't use it. I can't use it. I 7 can't turn it on. There's nothing I can do 8 with it. It's just out there, an inanimate 9 object. 10 As to the second piece, which 11 is the FCC's capability test, and the FCC put 12 this capability test in and you guys discuss 13 it at length in the draft decision, not to 14 address this specific situation, but they put 15 it in to address areas where you have spare 16 facilities that are part of your network but 17 may not actually be in use. For instance, 18 the ILECs had argued that dark fiber was not 19 a UNE because it was not actually in use at 20 the time, dark fiber being a piece of fiber 21 that has no equipment on it, but I can do 22 that pretty quickly. We had argued, Hey, 23 that's not actually in use; it's not a UNE. 24 FCC said, oh, no, I've got this capability 25 test. As long as it's capable of carrying</p> | <p style="text-align: right;">Page 25</p> <p>1 into service; it is not connected to my 2 network; it is not part of my network. So 3 from our perspective, there is no way as a 4 matter of law that you can define this as a 5 network element in the first instance to 6 allow you to get to unbundling. And that, we 7 submit, is a fatal error that must be 8 reconciled in any final decision. 9 Second, in the draft 10 decision, and actually throughout it, the 11 Department relies on the UNE remand order in 12 fashioning its impairment analysis and in 13 fashioning the impairment standard. It 14 relies on the UNE remand order. May I 15 approach? 16 THE CHAIRPERSON: Of course. 17 MR. MOREIRA: And I just 18 bracketed on pages 30 and 31 there's a long 19 discussion on UNE remand, and then on 20 pages 40 and 41, which I've highlighted for 21 you, there's a more in-depth or a more firm 22 upholding of the UNE remand order. And 23 specifically on pages 40 and 41, the 24 Department recites the UNE remand order's 25 impairment standard and says that it</p> |

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1 specifically agrees with it. That standard,
 2 however, was vacated in the D.C. Circuit's
 3 USTA decision. It was explicitly rejected
 4 and vacated.
 5 And just for your reference,
 6 the USTA decision is 290(F)3RD 415, and I go
 7 to the specific page just to read it into the
 8 record -- I know sometimes it gets a little
 9 monotonous to have someone do that -- on
 10 page 428 of USTA it specifically says:
 11 "Because the Commission's concept of
 12 impairing costs disparity is so broad and
 13 unrooted in any analysis of the competing
 14 values at stake in implementation of the Act,
 15 we cannot uphold even the two nonuniversal
 16 mandates adopted by the Commission for
 17 circuit switches and packet switches." They
 18 reject the entire impairment analysis in
 19 USTA.
 20 In the draft decision on
 21 page 35 in footnote 100 the Department
 22 disagrees with our contention that USTA
 23 vacated that, as does Gemini.
 24 However -- may I approach
 25 again?

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1 COMM. DOWNES: Yes.
 2 MR. MOREIRA: Thank you.
 3 COMM. DOWNES: Thank you,
 4 sir.
 5 MR. MOREIRA: In the
 6 triennial review order, on page 28,
 7 paragraph 31, so let's say you don't want to
 8 believe the telco, in paragraph 31 the FCC
 9 recognizes itself that the D.C. circuit in
 10 USTA did just that, it vacated the impairment
 11 standard. It says that right in the
 12 highlighted section of paragraph 31.
 13 So we submit again to you
 14 that any final decision cannot rely on the
 15 UNE remand order's impairment standard. In
 16 USTA it was specifically rejected. That
 17 specific paragraph that the Department agrees
 18 with was rejected in the context of line
 19 sharing in the USTA decision. It
 20 specifically found that reading the "seeks to
 21 offer," which is exactly how Gemini gets
 22 impairment in this case, is an unreasonable
 23 reading of the Act. The FCC recognizes that,
 24 and in paragraph 31 they say, Hey, we
 25 recognize that the UNE remand order was

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1 vacated in USTA versus FCC.
 2 So we request that the
 3 Department follow the impairment standard
 4 that exists currently in the TRO only.
 5 COMM. DOWNES: Now, this
 6 seems to indicate that the -- that the D.C.
 7 circuit sent this decision back to the FCC
 8 and asked them to -- asked them to reconsider
 9 and perhaps do some other things here. Has,
 10 in fact, the FCC responded to that remand
 11 order yet?
 12 MR. MOREIRA: Yes, they have.
 13 That's the triennial review order, and that's
 14 what you're looking at right there.
 15 COMM. DOWNES: I see.
 16 MR. MOREIRA: That is a
 17 summary of the FCC -- that's in their initial
 18 summary section of their triennial review
 19 order summarizing what has happened
 20 procedurally.
 21 COMM. DOWNES: Okay.
 22 MR. MOREIRA: They say, Hey,
 23 this was vacated, necessitating the triennial
 24 review order with this new impairment
 25 standard that we hand down in that order. So

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1 what we suggest here is any reference to UNE
 2 remand order impairment needs to be removed
 3 from any final decision; otherwise, it's an
 4 error as a matter of law because of what the
 5 current law is, is whatever the impairment
 6 standard is in the triennial review order.
 7 COMM. DOWNES: And the TRO, I
 8 take it, implemented a new impairment
 9 standard?
 10 MR. MOREIRA: Implemented,
 11 exactly, a new impairment standard.
 12 COMM. DOWNES: And how does
 13 the new impairment standard differ from the
 14 old one?
 15 MR. MOREIRA: Well, it varies
 16 greatly. I mean, it has multiple steps which
 17 really go to a factual matter, but it has
 18 multiple concepts that are not allowed in TRO
 19 that you adopt in your decision, and I'll get
 20 to them. I think I can explain if you allow
 21 me to continue with my argument. But it is a
 22 different standard, nevertheless.
 23 Here's -- this leads right
 24 into my next argument. The Department's
 25 draft decision is inconsistent with current

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| <p style="text-align: right;">Page 30</p> <p>1 federal law, which is the triennial review 2 order and USTA. Those are the two decisions 3 that guide us on unbundling because that's 4 the existing law. You have the D.C. Circuit 5 in USTA which forces the FCC to do TRO, then 6 you now have TRO which is currently the law 7 of the land on unbundling. Whether we like 8 it or not, that's what it is.</p> <p>9 It is inconsistent with 10 federal law. And let me explain why.</p> <p>11 First of all, what you see 12 there, the red coaxial facilities, were not 13 discussed in the triennial review order. 14 Nowhere will you find where the FCC has said 15 those facilities need to be unbundled or need 16 not be unbundled. You won't find it. Those 17 specific facilities are not even called a 18 loop in the sense as we know it in the 19 telecommunications industry. They refer to 20 them as intermodal loops because they 21 recognize one is an Apple and one is an IBM. 22 They're different kinds of loops. They're 23 quasi-loops, I'll grant you that, but they're 24 not a loop in the sense of 25 telecommunications.</p> | <p style="text-align: right;">Page 32</p> <p>1 Rocky Hill doesn't have its own central 2 office, but it's got remote terminals that 3 then feed into that. That's the hybrid loop 4 that they discuss in TRO, not this stuff here 5 (indicating).</p> <p>6 The Department recognizes 7 that it's not discussed in the draft 8 decision, and I believe on page 37 the draft 9 decision says, We recognize that it is not 10 discussed, but at the same time then says we 11 think it's the equivalent of the hybrid loop 12 that's up there. It then doesn't give any 13 real rationale as to why it's an equivalent. 14 We tend to think it is not.</p> <p>15 Let's assume for purposes of 16 argument that it is an equivalent. Even if 17 it were an equivalent, in the triennial 18 review order on page 176, paragraph 296, the 19 FCC says: If you have these hybrid loops, 20 ILEC, you have to unbundle only a narrow-band 21 path, but if you want, at your own 22 discretion, you can run a copper loop, and 23 that's good enough to meet the unbundling 24 standard. You don't even need to give them 25 access to that. If you give them a copper</p> |
| <p style="text-align: right;">Page 31</p> <p>1 In the FCC's triennial 2 review order they talk about three loops. 3 They talk about -- because that's what this 4 whole case is about, really, the loop 5 setting -- they talk about copper based 6 loops; they talk about hybrid loops; and they 7 talk about fiber to the home loops.</p> <p>8 In the triennial review 9 order, copper loops have to be unbundled 10 really to the furthest extent because it is a 11 legacy-based network and they believe that it 12 sends the best investment signals to unbundle 13 the copper.</p> <p>14 As to hybrid loops, which are 15 a little different -- and may I? -- a hybrid 16 loop -- I don't know what I did with my 17 pens -- a hybrid loop generally speaking will 18 come from a central office -- I'll draw it 19 down here. You'll get fiber from the central 20 office to a remote terminal -- am I right 21 there, terminal? -- and then from the remote 22 terminal you'll have the same copper setting 23 and, in essence, extends the reach of the 24 central office, is all it does, you know, 25 kind of like the Rocky Hill case because</p> | <p style="text-align: right;">Page 33</p> <p>1 loop, you don't need to provide them the 2 hybrid loop.</p> <p>3 May I approach? 4 THE CHAIRPERSON: Uh-huh. 5 MR. MOREIRA: Yes. It's on 6 the next page, bottom of the first page, and 7 on the next page it's called a "home run 8 loop." So as long as the telco provides a 9 home run loop, I don't even need to provide 10 them a hybrid loop, and if that's the case, 11 there is no way that our coaxial facilities 12 that are outside the unbundling of those is 13 consistent with the law, presuming for the 14 moment that they are an equivalent, which we 15 do not think they are. That's the first 16 inconsistency with current federal law on 17 triennial review.</p> <p>18 Next, throughout the draft 19 decision, particularly on pages 41 and 42 of 20 which I will provide copies to you, the 21 Department finds that Gemini meets the 22 impairment standard, and it's really the only 23 way you can get there because, at least in 24 the Department's mind, they meet the 25 impairment standard because accessing our</p> |

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1 current unbundled facilities would force
 2 Gemini to destroy its cable modem business
 3 plan. That's the argument of meeting
 4 impairment, i.e., our facilities are not good
 5 enough, our facilities don't match their
 6 Apple, our IBM doesn't match their Apple,
 7 therefore they're useless to them, and they
 8 are impaired.

9 May I approach?
 10 COMM. DOWNES: Uh-huh.
 11 MR. MOREIRA: And I've
 12 highlighted the specific portions where that
 13 argument is made in the draft decision by the
 14 Department.

15 COMM. DOWNES: Thank you.
 16 MR. MOREIRA: That
 17 business-specific analysis, that analysis
 18 that says, Hey, let's look at Gemini, see
 19 what their business plan is, and if they're
 20 impaired based on their specific business
 21 plan, was specifically rejected in the USTA
 22 decision and again in the triennial review
 23 order.

24 In USTA when they were
 25 talking about the line sharing order, the FCC

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1 tried to uphold it by saying, Hey, I've
 2 looked at this statute. It's what they seek
 3 to offer. The DSL companies seek to offer
 4 DSL without access to line sharing. They
 5 can't do it. They therefore are impaired.

6 The D.C. Circuit said that's
 7 unreasonable. The D.C. Circuit said, Hey,
 8 you've got to look at a lot of other factors,
 9 and that is a much too narrow a reading of
 10 unbundling rules. That's what they said in
 11 USTA.

12 In triennial review -- and
 13 I'm looking for something here -- the FCC
 14 recognized in paragraph 115 that they will no
 15 longer look at a business-specific --
 16 business plan specific view of impairment.
 17 And I have it here, and I'll bring it up in a
 18 second.

19 (Pause.)
 20 MR. MOREIRA: Well, I have it
 21 but I can't locate it. Paragraph 115 of the
 22 triennial review order, please take a look at
 23 it. They specifically reject a
 24 business-specific analysis, and that's what
 25 the Department does here. So that makes it

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1 completely inconsistent on impairment as to
 2 what the law is for unbundling.

3 Basically what we're saying
 4 here in this argument is if I've got all my
 5 blue stuff unbundled and I meet all the rules
 6 and regulations to unbundle it, how could
 7 you, as a matter of law, be impaired? That's
 8 what we're saying there. So your business
 9 plan doesn't matter. What kind of equipment
 10 you use, that's your business. What we have
 11 here is what we have unbundled, and if it's
 12 not good enough for you, well, then you have
 13 to build it on your own. If it's good
 14 enough, then use it. But you can't look at
 15 what they're using to find impairment.
 16 You've got to look at what's out there and
 17 what other people are accessing every day.
 18 That's our argument there.

19 In addition, in the draft
 20 decision the Department looks at what are the
 21 benefits to unbundling this specific coaxial
 22 facility? The Department finds that this
 23 would be good for competition. The
 24 Department finds that if we unbundle this,
 25 Gemini will spend millions of dollars in

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1 investments to make this a going network.

2 However -- and those are all
 3 fine things from a public policy perspective,
 4 but, number one, they don't get you
 5 impairment; and number two, that goes
 6 directly -- well, it only is half the
 7 analysis is probably the best way to look at
 8 it.

9 In USTA the district -- the
 10 D.C. Circuit specifically said you have to
 11 balance the benefits of unbundling against
 12 the costs of unbundling. The draft decision
 13 nowhere covers what the costs of unbundling
 14 are, and there are serious costs.

15 Whenever you unbundle
 16 something and you force someone to share
 17 something, you've now created a disincentive
 18 for that given company to invest in future
 19 assets, take more chances and saying, well,
 20 gee, we tried HFC and that didn't work.
 21 Well, am I going to try fiber to the home?
 22 Well, maybe not. Hey, am I going to try PDQ
 23 technology that Cisco came out with? Maybe
 24 not, because if I have to share my investment
 25 with a competitor who doesn't have to spend

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1 any money, I may not invest in that and just
 2 stay with the status quo. And the USTA
 3 decision covers that and says, Hey, you have
 4 to balance both.
 5 I'm not telling you here,
 6 although I think you know where I think the
 7 balance falls, but that balancing analysis
 8 still needs to be carried out in the
 9 decision, and it wasn't carried out.
 10 Next, the Department relies
 11 on its own independent state unbundling
 12 authority to unbundle these coaxial
 13 facilities, and in the TRO the FCC says, yes,
 14 states can unbundle -- again, I don't
 15 necessarily agree with it -- but states can
 16 unbundle under their own independent state
 17 authority so long as it is consistent with
 18 what we say here. So if we say "X," and then
 19 you do opposite of "X," you can't do that,
 20 but as long as it's consistent with what we
 21 say here, you can do it.
 22 The state's unbundling
 23 statute is 16-247(b)(a). May I approach?
 24 THE CHAIRPERSON: You may.
 25 COMM. DOWNES: Thank you.

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1 MR. MOREIRA: (b)(a) is where
 2 we have, the DPUC has its authority to
 3 unbundle. It's the only location it can go,
 4 and it has to strictly follow whatever the
 5 statute says. And the statute says, whether
 6 on a petition or on its own motion, the
 7 Department can initiate a proceeding -- this
 8 one is a petition -- to unbundle a -- these
 9 are critical words here -- telephone
 10 company's network, services and functions.
 11 In this case it's network, so telephone
 12 company's network that are used to provide
 13 telecommunication services, which the
 14 Department determines after noticing hearing,
 15 another critical word, that are in the public
 16 interest consistent with federal law and
 17 technically feasible.
 18 There's multiple elements,
 19 but the elements that I really want to cover
 20 are telephone company's network. Yes, you
 21 can unbundle anything within my network.
 22 This is not within my network. Under state
 23 law you can't unbundle this.
 24 So if I bought a cable
 25 company tomorrow, Telemedia in Waterbury, you

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1 couldn't order me to unbundle it just because
 2 I owned it. You could only order me to
 3 unbundle something that's actually part of my
 4 network, my telephone company's network.
 5 Second, you would only
 6 unbundle if it's technically feasible of
 7 being tariffed. We haven't even addressed
 8 technical feasibility in this draft decision.
 9 We have not had a hearing to address the
 10 merits, so I think both parties agree, at
 11 least in principle, at least in broad theory,
 12 no one really knows how to unbundle. Gemini
 13 will argue we don't need to unbundle, we'll
 14 take the whole thing. That's our method of
 15 unbundling. Having said that, how do I share
 16 this network on a nondiscriminatory basis and
 17 tariff it, as I'm required to do by statute,
 18 if nobody knows how? We certainly should be
 19 afforded an opportunity to demonstrate
 20 technical feasibility.
 21 Lastly, in the TRO and in all
 22 the other FCC unbundling decisions, the FCC
 23 defines the component parts of our network
 24 that can be unbundled. So, for instance,
 25 they define the loop, which I showed to you

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1 earlier which really goes from the
 2 distribution mainframe to the house, right to
 3 that little box on the side of your house.
 4 That constitutes a loop. They talk about
 5 subloops, which will be a piece of that. It
 6 typically has a specific point that you could
 7 attach to that allows you to make that
 8 differential. They talk about transport,
 9 which would be central office to central
 10 office. They talk about switching. They
 11 talk about other things, but generally
 12 speaking those are the broad brush strokes of
 13 components that can be unbundled.
 14 I don't know, and I don't
 15 think anybody knows, what this is. When I
 16 say "what this is", I'm talking about the red
 17 stuff. It's not a loop because it doesn't go
 18 from my central office mainframe or even from
 19 my central office directly to somebody's
 20 house. It's not that. It's not transport.
 21 It doesn't go from central office to central
 22 office. It's not a subloop because it
 23 doesn't meet the subloop definition in
 24 47 CFR 51.319. It doesn't meet that
 25 definition. It's not switching. Well, if

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| <p style="text-align: right;">Page 42</p> <p>1 it's none of those things, you then have to 2 create some other kind of element, of which I 3 do not know what it exists or what we would 4 call it, which is a problem in and of itself. 5 If it doesn't meet any of 6 those standards, how are you consistent with 7 federal law when we don't even know how to 8 characterize it? As best as I can tell, 9 they're trying to create some form of 10 footprint to allow them to continue their 11 cable modem business, but what that footprint 12 is and what it constitutes, I have no idea 13 under what federal law has defined for 14 telecommunication services. I just don't 15 know. 16 Those are the main pure legal 17 issues where I can say, hey, take a look at 18 this statute or, hey, take a look at this 19 case. But there are others, and the other 20 issues, I'd like to characterize them. 21 They're just as critical but they're more 22 procedural in nature. And we address this in 23 our written exceptions. 24 We submit that in this draft 25 decision the Department, I believe</p> | <p style="text-align: right;">Page 44</p> <p>1 obtaining permits, et cetera. There's four 2 or five elements that are broad that they 3 cover as to when something should or should 4 not be impaired. They say, Hey, they meet 5 all that evidence, but there's been no 6 evidence presented factual or otherwise in 7 this docket, none whatsoever. 8 We agreed not to have a 9 hearing because we thought it was addressing 10 solely the legal issues. We still believe 11 there's warranted a factual hearing to 12 address, do they meet any of these criteria 13 as a factual matter? 14 And, secondly, we are also 15 entitled to establish that this is 16 technically unfeasible, factually, because if 17 it is, it is a defense to unbundle. If it's 18 not, then it would be unbundled. Those 19 issues need to be addressed in a factual 20 hearing, as opposed to the legal issues which 21 were addressed. 22 And we believe that we would 23 be upheld on requiring a hearing because 24 16-247(b)(a) requires just such a hearing. 25 Lastly, from a procedural</p> |
| <p style="text-align: right;">Page 43</p> <p>1 unintentionally, went a little further than 2 what the scope had permitted. The scope was 3 laid out on February 10, 2003 in a Department 4 letter ruling where the Department says, 5 basically, that they are in agreement with 6 SNET that this case should be bifurcated. We 7 will address the legal issues here, and then 8 we will proceed accordingly. Because there 9 were substantial legal issues. Does the 10 Department have jurisdiction, independent 11 jurisdiction to unbundle? Are these kind of 12 elements or these components even subject to 13 unbundling in a broad perspective? Does 14 Gemini have standing -- and I use the word 15 "standing" only because I couldn't figure out 16 a better word -- does it have standing to 17 even establish impairment as a matter of law? 18 The Department went beyond 19 that in this decision. The Department said, 20 yes, Gemini meets all those standards. Yes, 21 we have jurisdiction. Yes, these elements 22 are subject to unbundling, but then said, 23 hey, as a factual matter, it meets the TRO's 24 impairment standard, which talks about first 25 mover advantages, sunk costs. It talks about</p> | <p style="text-align: right;">Page 45</p> <p>1 perspective, the Department -- and I've been 2 talking a long time, and I'm sure I've even 3 bored myself -- from a procedural 4 perspective, the Department had an 5 implementation order which we just believe is 6 unrealistic. Let's presume I'm wrong on all 7 of these things and you decide to go forward. 8 The Department ordered that we 9 have an inventory by February 1, 2003. The 10 Department ordered that cost studies be 11 prepared by May 1, 2003. And then we have an 12 operational OSS in place by June 1, 2004. 13 And I used the wrong numbers. It's 2004 for 14 all of those. We cannot meet any of those 15 deadlines. 16 With the winter, it's going to 17 take us about 8,000 man hours to do the 18 inventory of the 3000-plus miles that are out 19 there. There is no way we can get it done by 20 February 1. We would ask that that be moved, 21 extended out, certainly to at least April 30. 22 Hopefully, we can get it done by then. 23 As to the cost studies, 24 Gemini, in its written exceptions, threw a 25 big monkey wrench into this because presuming</p> |

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| <p style="text-align: right;">Page 46</p> <p>1 we lose, we do believe this has to be priced 2 at TSLRIC. To be priced at TSLRIC we need to 3 define exactly what the element is so that 4 then you can go out and do the pricing. 5 There's no way we can meet by May 1 that 6 deadline without having those specifics in 7 place, and Gemini doesn't even want TSLRIC 8 used.</p> <p>9 I think they, even based on 10 what I read, implicitly would like it close 11 to nothing, because from their perspective 12 this was abandoned and they think we should 13 use a completely different pricing 14 methodology based on some technical meetings 15 that we would have.</p> <p>16 We don't have a problem with 17 technical meetings, but whatever it's going 18 to be priced at, even though we don't think 19 TSLRIC is a fair pricing, we have to follow 20 TSLRIC for UNE pricing if we ever got to 21 that. We pray and hope that you'll change 22 your mind.</p> <p>23 As to the OSS, no one knows 24 of any vendor that even has built an OSS for 25 HFC type facilities because cable companies</p> | <p style="text-align: right;">Page 48</p> <p>1 600,000 estimate, but we certainly could live 2 with half, but there needs to be a letter of 3 credit, and we expect and would prefer a 4 letter of credit, as well, for the OSS 5 because that's not going to be an inexpensive 6 task as well.</p> <p>7 I think I've covered all the 8 issues. I've made a big mess, and I 9 appreciate your time very much. Thank you.</p> <p>10 THE CHAIRPERSON: Attorney 11 Moreira, that was very impressive.</p> <p>12 COMM. DOWNES: Certainly was.</p> <p>13 THE CHAIRPERSON: Attorney 14 Janelle.</p> <p>15 MS. JANELLE: Good morning, 16 Commissioners.</p> <p>17 THE CHAIRPERSON: Good 18 morning.</p> <p>19 MS. JANELLE: Jennifer 20 Janelle from Murtha Cullina on behalf of 21 Gemini Networks.</p> <p>22 I think I'm going to start 23 this morning by saying obviously Gemini came 24 to the Department seeking to have the HFC 25 network of SBC unbundled, and in this case</p> |
| <p style="text-align: right;">Page 47</p> <p>1 don't have to share their networks. No one 2 has ever developed it. It probably would 3 have been developed if Lucent and Nortel kept 4 going on the HFC path. They never did. So 5 there's no OSS. We'll have to find someone 6 who's willing to do it and get them to build 7 it. I know in this technological age it's 8 doable, but it's certainly going to take some 9 time, and June 1 is just not a realistic time 10 frame.</p> <p>11 Assuming that, our last 12 points really go to -- let's assume you think 13 I'm all wet on all of these things and you 14 want to just proceed. With respect to the 15 inventory, which we do agree should be split, 16 we would prefer that they pay for all but 17 split seems reasonable to us, we request that 18 they give us a revokable letter of credit to 19 pay for their share of the inventory, at a 20 minimum.</p> <p>21 We would prefer that they 22 put all of it up front to make sure they 23 don't walk away and then we are left holding 24 the bag if they decide not to use this 25 network. We would prefer for the total</p> | <p style="text-align: right;">Page 49</p> <p>1 the Department did exactly what is required 2 of it by both federal and state law.</p> <p>3 All of the issues raised here 4 today, all of the legal issues pointed out by 5 Attorney Moreira, have been raised in this 6 proceeding. They've been briefed, briefed 7 again. There have been written comments 8 filed, and the Department has adequately 9 addressed them all in its draft decision. I 10 am going to rebut, obviously, and point out a 11 few things with respect to some of the things 12 that Attorney Moreira has said, but we 13 believe that jurisdiction as to unbundling is 14 clear and that the Department appropriately 15 applied the law.</p> <p>16 I am going to start, though, 17 with the one sentence that I heard this 18 morning that I can say that Gemini absolutely 19 agrees with, and that is that in this case 20 the Department went beyond the scope of what 21 this phase was supposed to be about.</p> <p>22 In response to SBC's motion 23 to bifurcate this proceeding, the Department 24 ruled that phase one was going to be limited 25 to the issues surrounding unbundling, and</p> |

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1 that's what Gemini briefed, and we were told
 2 that *issues surrounding cost of service and*
 3 *inventory* would be dealt with in a subsequent
 4 phase.

5 So we didn't present any
 6 evidence on those issues, and, in fact, the
 7 discovery we requested with respect to those
 8 issues was denied, and we were told that
 9 those issues would be taken up in phase two.
 10 And then the draft decision came out, and we
 11 were somewhat surprised to see that there
 12 were rulings with respect to payment for cost
 13 of service, inventory and OSS.

14 And, unfortunately, if the
 15 draft is finalized as it stands with those
 16 rulings, with respect to payment for cost of
 17 service, OSS and inventory, it's really going
 18 to be a loss, and a loss for everyone,
 19 because Gemini cannot proceed to utilize this
 20 network with those kinds of up-front costs.
 21 And we believe that these were inadvertent
 22 rulings with unintended consequences by the
 23 Department, and I want to just take a minute
 24 and explain our position on that and what we
 25 sort of intended would happen as part of the

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1 phase two.

2 I'll talk about the three
 3 issues separately: The cost of service, the
 4 inventory and the OSS.

5 And I'll start with the OSS.
 6 We've spoken with our consultant and we've
 7 been told that development of the OSS, and I
 8 think what Attorney Moreira has said, he
 9 would agree with this, it's going to be in
 10 excess of \$5 million, \$5 million before we
 11 start, \$5 million before the network is
 12 activated, \$5 million before we can use it.
 13 That's a competitive barrier. That's a
 14 barrier to market entry for Gemini and also
 15 we believe for any other company that would
 16 seek to utilize this network to provide
 17 competitive services to customers.

18 The second point with respect
 19 to the OSS, as envisioned by the draft and by
 20 SBC, is that it's entirely unnecessary, and I
 21 feel a little bit of a disadvantage because I
 22 don't draw and I don't have handouts, but I'm
 23 going to rely a little bit on Attorney
 24 Moreira's diagram.

25 THE CHAIRPERSON: We're going

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1 to hold that against you, too.

2 MS. JANELLE: Please don't.

3 The OSS that SBC is talking about is an OSS
 4 that's going to handle the installation, the
 5 billing, the maintenance for the millions of
 6 twisted pair lines that run independently to
 7 everybody's home. We're not talking about
 8 these lines. We're not talking about these
 9 separate individual pieces. Attorney Moreira
 10 is correct. We don't need an OSS to do this.

11 We are talking about the red.

12 We're talking about the network that goes
 13 from pole to pole. It's not consisted of
 14 individual twisted pairs. It's a pipeline.
 15 It's bandwidth. And what we have proposed is
 16 that we would lease that bandwidth on a
 17 per-mile basis.

18 And by leasing it on a
 19 per-mile basis, the OSS can be as simple as
 20 somebody sitting down at a word processor and
 21 saying, you've leased a thousand miles; it's
 22 ten dollars per mile, which is the figure I
 23 heard and that sounds good to me, so,
 24 therefore, please send us your money. A
 25 thousand miles times ten dollars, that's the

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1 bill. That's the OSS that's needed.

2 As far as maintenance and
 3 repair, Gemini has submitted in this
 4 proceeding that it will maintain the network.
 5 It will upgrade the network. It will repair
 6 the network. There's no need for SNET to
 7 dispatch technicians to do that. And that
 8 also places SNET in the unique position of
 9 being able to lease a broken, useless,
 10 worthless piece of equipment, which is how
 11 they've characterized it, and get back at the
 12 end of the lease period a fully functional,
 13 upgraded network at absolutely no cost to
 14 them; functional and available to lease to
 15 the next party that comes through the door
 16 that wants to lease it.

17 And the best analogy I can
 18 give you would be if you owned a house and it
 19 had a hole in the roof and a crack in the
 20 foundation and clapboard siding falling off,
 21 and I move into your house. And I pay you
 22 rent of \$500 a month, and I replace the roof,
 23 I fix the foundation and I put up brand-new
 24 vinyl siding, all while I'm paying you \$500 a
 25 month, and the upgrades and repairs at my

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| <p style="text-align: right;">Page 54</p> <p>1 sole cost. Then I move out. Well, the next 2 person that moves in, you've got a beautiful, 3 near brand-new house that you can rent out 4 for a lot more money at absolutely no cost to 5 you and only profit. And that's what we've 6 proposed in this proceeding, and that's why 7 an OSS, as envisioned by SBC, is absolutely 8 unnecessary.</p> <p>9 This leads me to the issue of 10 we don't know how to unbundle this. We've 11 got to provide nondiscriminatory access to 12 everybody who wants to use it, and I would 13 submit that, again, we have -- we do intend, 14 we would like to lease the whole thing. Is 15 that going to happen from day one? I don't 16 know. I can't say. That's something that's 17 got to be worked out at the conclusion of 18 this proceeding. But it's conceivable to 19 Gemini that they could lease maybe the HFC 20 network in Hartford and some other company 21 could lease the HFC network in Fairfield. 22 You can have multiple companies using 23 portions of this network, different portions 24 of the network in different areas of the 25 state, and that can be accomplished through</p> | <p style="text-align: right;">Page 56</p> <p>1 I think it's being made far more complicated 2 than it needs to be.</p> <p>3 Number two. With respect to 4 the inventory, again, we think that this, 5 number one, is wholly unnecessary in this 6 proceeding. The fact is that SBC has the 7 inventory. They have a complete inventory of 8 the HFC network with an approximately 9 94 percent degree of accuracy.</p> <p>10 On May 1 of 2001, SBC filed 11 its compliance plan in Docket Number 12 00-08-14, where they were giving up the 13 network. As part of that compliance plan 14 they had a complete valuation of the network 15 done by Arthur Andersen. There is a complete 16 inventory of this network as of May 1, 2001. 17 Now, SBC has made statements that, well, 18 we've been taking parts down; we haven't kept 19 records; and that's true. During SBC's 20 appeal of the Department's order that they 21 stopped taking down the network, with 22 representatives of the Department and the 23 Attorney General's Office present, and I 24 believe Consumer Counsel was there also, SBC 25 stated that they had removed a little less</p> |
| <p style="text-align: right;">Page 55</p> <p>1 unbundling.</p> <p>2 And as far as the contention 3 that this network needs to be made available, 4 the same piece, to multiple users, I submit 5 that that's not true. And the reason is, you 6 can look at, for instance, dark fiber. Dark 7 fiber is a UNE. Dark fiber is available to 8 anyone who asks for it, but if a company 9 comes in and asks for dark fiber and there's 10 none available because it's all being used, 11 SBC doesn't go out and construct new dark 12 fiber for this person or this company. They 13 say, We're sorry, there is no more available. 14 And that is the exact same situation that can 15 be applied to the HFC network in this 16 proceeding.</p> <p>17 If Gemini is leasing it in 18 Hartford, and another company comes along and 19 says, we'd like to use it. I'm sorry, it's 20 being used. It's not available. And if 21 CableVision or another company is utilizing 22 the HFC network in Fairfield and Gemini says, 23 we'd like to lease it in Fairfield. The 24 answer is, I'm sorry, it's not currently 25 available. This is a workable situation, and</p> | <p style="text-align: right;">Page 57</p> <p>1 than 200 miles of the network.</p> <p>2 THE CHAIRPERSON: This is an 3 appeal in court.</p> <p>4 MS. JANELLE: I'm sorry. The 5 appeal across the plaza in Superior Court. 6 Two hundred miles out of a 3,196-mile network 7 is approximately 6 percent.</p> <p>8 So if we accept the inventory 9 that currently exists, there's a 6-percent 10 margin of error, and Gemini is willing to 11 accept that risk. We think that during our 12 buildout and our upgrade and our maintenance, 13 obviously we will discover that 6 percent 14 that's missing.</p> <p>15 Now, as to anything that's 16 been removed from that time to the present, 17 the stipulation that resolved that appeal in 18 Superior Court required SBC to keep very 19 detailed records of what's being removed, 20 also keep the as-built plans for the network, 21 so we know that those exist also. And Gemini 22 has a right to inspect and make sure that 23 those records are being kept, and we, in 24 fact, did send an engineer to SBC and we have 25 confirmed that those records are being kept.</p> |